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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 790

LARRY WAYNE HELBERG AND DAVID LANDWORTH,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted by a jury in the United States District Court for the Western District of Washington of three counts of unlawfully transporting falsely made and forged money orders, in violation of 18 U.S.C. 2314 and 2 (I R. 1, 3, 10, 11). On December 3, 1964, each was sentenced to concurrent five-year terms on the first two counts, followed by a suspended sentence and five years' probation on

Count III (I R. 12, 13). The court of appeals affirmed *per curiam* (I R. 14, 15, 35; 365 F. 2d 314).

The government's evidence (the sufficiency of which is not challenged) showed that a number of American Express money orders, including those mentioned in the indictment, were stolen from a pharmacy in Seattle, Washington, on August 29, 1963 (Tr. 105).[1] Shortly thereafter, petitioners asked one Moore to help them cash some money orders (Tr. 43-45). They made the same request of one Chinneth, who, in return for $100, secured the services of two women, Darris Wilson and Darlene Sullivan, to cash the money orders (Tr. 53-56). Both women testified that, at petitioners' request, they filled in and cashed the three money orders mentioned in the indictment and gave petitioners the proceeds (Tr. 60-70, 81-85).

1. On direct examination petitioner Landworth testified that he was "in custody" in 1963 and that he had been convicted of a felony (not described) in 1964 (Tr. 166-167, 169). On cross-examination, in response to the question whether he had been convicted of second-degree burglary in California on March 24, 1959, he said he did not remember being convicted of a felony and that he did not recall being in jail in California. In response to a question by the court as to whether he recalled being convicted of any crime about that time in California, Landworth testified that he could not be sure (Tr.

[1] "Tr." refers to the transcript of the trial testimony in Volume II of the record.

171). Petitioner Helberg testified on cross-examination that he had been convicted of car theft in California. This was shown by a certified copy of conviction (Gov. Ex. 9) to be a felony (Tr. 155-157, 161-162).

It is well settled that evidence of a witness' prior felony conviction is admissible for purposes of impeachment. See, *e.g.*, *United States* v. *Comi*, 336 F. 2d 856, 861 (C.A. 4), certiorari denied, 379 U.S. 992; *Schwab* v. *United States*, 327 F. 2d 11, 16-17 (C.A. 8); *Taylor* v. *United States*, 279 F. 2d 10, 12 (C.A. 5); *United States* v. *Senior*, 274 F. 2d 613, 616 (C.A. 7); *Bush* v. *United States*, 267 F. 2d 483, 489 (C.A. 9); *United States* v. *Howell*, 240 F. 2d 149, 157-158 (C.A. 3); *Henderson* v. *United States*, 202 F. 2d 400, 405 (C.A. 6). There is no occasion to re-examine that principle here. No objection was made at trial to the introduction of petitioners' prior felony convictions. Indeed, in the case of petitioner Landworth, his own counsel elicited the fact of a prior conviction on direct examination. Petitioners' counsel also used evidence of prior convictions to impeach government witnesses (Tr. 56-57, 77). As the trial court properly instructed the jury (Tr. 220), the evidence of prior convictions was relevant to determining the witnesses' credibility. Surely, it was not plain error (Fed. R. Crim. P. 52(b)) for the court to admit this evidence.

2. Petitioners' challenge to the introduction of evidence of "other crimes" (Pet. 6-10) is also without merit. Darlene Sullivan, one of the women who cashed money orders for petitioners, testified (without objection) that she cashed about 10 or 20 money

orders, which was about half of the money orders she observed in petitioners' possession (Tr. 80). This evidence of similar acts was admissible to show motive and intent. See *Williamson* v. *United States*, 207 U.S. 425, 450-451; *Moore* v. *United States*, 150 U.S. 57, 59-61; *United States* v. *Robbins*, 340 F. 2d 684, 688 (C.A. 2). Witness Moore testified, also without objection, that petitioner Landworth told him that the money orders had been acquired through a burglary in a certain district of the city (Tr. 46). The trial court, *sua sponte*, instructed the jury not to consider this testimony against petitioner Helberg *(ibid.)*. This evidence was properly admitted to show petitioner Landworth's knowledge of the money orders and their source.

3. During the government's case-in-chief the court permitted F.B.I. agent Hicks to testify, over defense objections of immateriality and prejudice, that both petitioners had given exculpatory statements. Hicks testified that both petitioners, after being warned of their rights subsequent to their arrests on different dates, stated that they did not know Darlene Sullivan, Darris Wilson, or Chinneth, whose photographs were shown to them, and that they were innocent of any charge (Tr. 135-139, 143, 146).

This evidence was properly admitted as bearing on guilty knowledge. See *United States* v. *Inciso*, 292 F. 2d 374, 379-380 (C.A. 7), certiorari denied, 368 U.S. 920. See also *Opper* v. *United States*, 348 U.S. 84, and *Hollingsworth* v. *United States*, 321 F. 2d 342, 347, 350 (C.A. 10). The court in its final charge properly instructed, without defense objection, that

"[w]hen a defendant upon inquiry by an investigating officer voluntarily makes some statement regarding the matters under inquiry and pertinent thereto which tends to establish his innocence and such statement is later shown to be false, you may consider whether this circumstantial evidence points to a consciousness of guilt" (Tr. 213).

4. Finally, petitioners challenge the propriety of certain arguments of government counsel, none of which was objected to at trial. The present, belated objections are without merit.

a. Referring to Darlene Sullivan's testimony that she had cashed 10 to 20 money orders, about half the total in petitioners' possession, petitioners' counsel argued to the jury as follows (Tr. 197): "The point is, why do you charge three counts if you have a bag full of money from cashed money orders?" Government counsel responded (Tr. 201-202):

> And why the government did not charge them with forging thirty or forty money orders? It's not necessary. That's not the issue in this case. The only issues are these three that we have charged them with. What necessity is there of charging them with fifty counts if they deny even three?

This argument was a permissible response to the argument of defense counsel.

Petitioners' counsel also suggested to the jury, in closing argument, that, even if petitioners accompanied one or both of the women into the stores where they cashed money orders, "[t]his doesn't mean that these defendants knew what the girl was doing * * *"

(Tr. 198). The prosecutor's response to this argument—"Well, in a three day period you stop by ten to twenty stores and I think you get an idea of what was taking place" (Tr. 203)—was also permissible in light of petitioners' argument and the evidence in the case.[2]

b. Petitioners also challenge the following statement made to the jury in closing argument by government counsel (Tr. 184-185):

> When they approached the Wallingford district Mr. Landworth stated to Mr. Moore, "This is the district where we acquired the money orders through a burglary."

The evidence to which this statement referred—*i.e.*, Moore's testimony that Landworth told him that the money orders were acquired through a burglary in the Wallingford district (Tr. 46)—was admitted against petitioner Landworth only. It is argued that the prosecutor's use of the word "we" was misstatement. This apparently was not considered sufficiently significant, however, to warrant objection at the trial, and it may not be relied on as prejudicial error now. It must be assumed that the jury followed the court's charge that statements by counsel "not supported by the evidence should be completely and totally disregarded by you" (Tr. 209).[3] *Opper* v. *United States*,

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[2] Darlene Sullivan testified that she had cashed 10 or 20 money orders in a three-day period and that petitioner Landworth accompanied her when she cashed them (Tr. 80-81, 84-85).

[3] At the start of his closing argument government counsel stated (Tr. 182): "I wish to stress, as indicated by the

348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

c. In his closing argument, government counsel urged that the government witnesses had told the truth and that petitioners had lied in their denials from the stand. This argument was not improper. It was a response to argument by petitioners' counsel attacking the credibility of the four government witnesses (Tr. 194-195, 198, 199) and setting forth petitioners' protestations of innocence (Tr. 196-197). Cf. *Homan* v. *United States*, 279 F. 2d 767, 775-776 (C.A. 8).

Counsel did not state a "personal opinion" of petitioners' guilt, as in *Steele* v. *United States*, 222 F. 2d 628, 631 (C.A. 5). Nor did his argument intimate that the government possessed secret knowledge of evidence of petitioners' guilt, which had not been presented to the jury. The absence of objection shows that the argument was not deemed prejudicial in its setting.

Court, that this is not evidence, and if any statement I make is wrong I assure you that it is unintentional and request that you remember the case as the evidence was presented to you by the witnesses."

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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